

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

AMY J. HUNT,

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Plaintiff,

v.

CLERK-ALBUQUERQUE  
No. 17cv985 MCA/LF

VALUE PLACE,

Defendant.

**MEMORANDUM OPINION AND ORDER**  
**GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS* AND**  
**DISMISSING COMPLAINT WITHOUT PREJUDICE**

**THIS MATTER** comes before the Court on *pro se* Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 2, filed September 26, 2017 ("Application") and on Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, Doc. 1, filed September 26, 2017 ("Complaint"). For the reasons stated below, the Court will **GRANT** Plaintiff's Application and **DISMISS** Plaintiff's Complaint **without prejudice**. Plaintiff shall have 21 days from entry of this Order to file an amended complaint. Failure to timely file an amended complaint may result in dismissal of this case without prejudice.

**Application to Proceed *in forma pauperis***

The statute for proceedings *in forma pauperis*, 28 U.S.C. § 1915(a), provides that the Court may authorize the commencement of any suit without prepayment of fees by a person who submits an affidavit that includes a statement of all assets the person possesses and that the person is unable to pay such fees.

When a district court receives an application for leave to proceed *in forma pauperis*, it should examine the papers and determine if the requirements of [28 U.S.C.] § 1915(a) are satisfied. If they are, leave should be granted. Thereafter, if the court finds that the allegations of poverty are untrue or that the action is frivolous or malicious, it may dismiss the case[.]

*Menefee v. Werholtz*, 368 Fed.Appx. 879, 884 (10th Cir. 2010) (citing *Ragan v. Cox*, 305 F.2d 58, 60 (10th Cir. 1962). “The statute [allowing a litigant to proceed *in forma pauperis* ] was intended for the benefit of those too poor to pay or give security for costs....” *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 344 (1948). While a litigant need not be “absolutely destitute,” “an affidavit is sufficient which states that one cannot because of his poverty pay or give security for the costs and still be able to provide himself and dependents with the necessities of life.” *Id.* at 339.

The Court will grant Plaintiff’s Application to Proceed in District Court Without Prepaying Fees or Costs. Plaintiff signed an affidavit stating she is unable to pay the costs of these proceedings and provided the following information: (i) Plaintiff is unemployed; (ii) Plaintiff receives \$772.00 in disability payments each month;<sup>1</sup> (iii) Plaintiff has no assets; (iv) Plaintiff has \$600.00 in a bank account; (v) Plaintiff’s average monthly expenses total \$560.00; and (vi) she is “having a hard time with my bills.” The Court finds that Plaintiff is unable to pay the costs of this proceeding because she is unemployed, and has relatively low monthly income which only slightly exceeds her monthly expenses.

#### **Dismissal of Proceedings *In Forma Pauperis***

The statute governing proceedings *in forma pauperis* requires federal courts to dismiss an *in forma pauperis* proceeding that “is frivolous or malicious; ... fails to state a claim on which relief may be granted; ... or seeks monetary relief against a defendant who is immune from such relief.” See 28 U.S.C. § 1915(e)(2). “[P]ro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir.

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<sup>1</sup> Plaintiff also indicates she received \$3,087.00 in “VA Benefits” each month during the past 12 months but does not expect such benefits next month. See Application at 2.

1991).

Plaintiff asserts a claim of disability discrimination against Defendant, who appears to be a hotel, stating:

I am being inhumanely discriminate cause I am in a wheelchair with a service dog for basic needs of toilet paper, changes of my linens, and being provided cancer sticks holes in my bedding, and they told pay extra for these items and housekeeping non-existence every other week unless you want pay extra. All they do is yell at guest and strip of reservations when guest to complain.

....

General Manger named Jenifer is very rude discrimintory person has no consideration with people with disabilities, and there are plenty of people disabilities cause veterans program, especially with people in wheel chairs and service animals, as well as her staff can't do simple tasks of basic need for disable people, and rather use her pregnancy to advantage.

[sic] Complaint at 2-3.<sup>2</sup>

Title III of the Americans with Disabilities Act prohibits discrimination against persons with disabilities in places of public accommodation. *See* 42 U.S.C. § 12182(a) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation”). Plaintiff makes the conclusory allegation that she was discriminated against because of she is disabled. However, “conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based . . . [and] in analyzing the sufficiency of the plaintiff's complaint, the court need accept as true only the plaintiff's

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<sup>2</sup> Plaintiff filed her Complaint using the form “Civil Rights Complaint Pursuant to 42 U.S.C. § 1983.” Section 1983 only authorizes suits against persons acting under color of state law. *See McCarty v. Gilchrist*, 646 F.3d 1281, 1285 (10th Cir. 2011) (“Section 1983 provides a federal civil remedy for the deprivation of any rights, privileges, or immunities secured by the Constitution by any person acting under color of state law”). There are no allegations that Defendant is a state actor.

well-pleaded factual contentions, not his conclusory allegations.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). Plaintiff also alleges that she has to pay extra for toilet paper and linen changes but does not allege any facts showing that she is charged those extra costs because of her disability. Plaintiff has not shown that she is entitled to relief.

The Court will dismiss the Complaint without prejudice for failure to state a claim. Plaintiff shall have 21 days from entry of this Order to file an amended complaint. Failure to timely file an amended complaint may result in dismissal of this case without prejudice.

#### **Service on Defendant**

Section 1915 provides that the “officers of the court shall issue and serve all process, and perform all duties in [proceedings *in forma pauperis*]”). 28 U.S.C. § 1915(d). Rule 4 provides that:

At the plaintiff’s request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

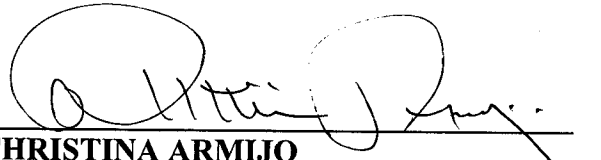
Fed. R. Civ. P. 4(c)(3).

The Court will not order service of Summons and Complaint on Defendant at this time. The Court will order service if Plaintiff timely files an amended complaint which states a claim over which the Court has jurisdiction, and which includes the address of every defendant named in the amended complaint.

**IT IS ORDERED** that Plaintiff’s Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 2, filed September 26, 2017, is **GRANTED**.

**IT IS ALSO ORDERED** that Plaintiff’s Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, Doc. 1, filed September 26, 2017, is **DISMISSED without prejudice**.

Plaintiff may file an amended complaint within 21 days of entry of this Order.

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**M. CHRISTINA ARMIJO**  
**CHIEF UNITED STATES DISTRICT JUDGE**